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Murr v. Wisconsin: A Necessary Evil?

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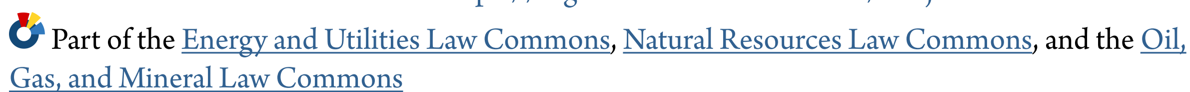

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ONE J

Oil and Gas, Natural Resources, and Energy Journal

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MURR V. WISCONSIN: A NECESSARY EVIL?

SHA'KERA TRIMBLE[*]

I. Introduction: The Root of the Fifth Amendment

The right to acquire and possess property has long been established, and since, reaffirmed, as a right fundamental to our society.[1] In fact, during the time leading up to our present Constitution, hundreds of amendments were proposed.[2] Of those, the Fifth Amendment, which included some indicia of protection of private property, survived the cut[3] and joined nine other amendments that would come to be known collectively as the Bill of Rights. A property owner naturally expects that he will be permitted to do as he pleases with his own property. After all, few individuals purchase a house with an expectation that someone else will dictate the color the fence will be painted or expecting that someone can prevent them from converting the home into a Bed and Breakfast.

Nevertheless, the rights and expectations associated with property ownership constantly face opposition. Where property rights in general are recognized and defined by the government, competing interests between state and local governments and property owners continue to produce

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1. *See* Saenz v. Roe, 526 U.S. 489, 524-25 (1999) (Thomas, J., dissenting) (quoting Corfield v. Croyell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

2. Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1279 (2002).

3. *See id*. at 1278-87.

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conflict and litigation, particularly when a government action or regulation prevents an owner of real property from using his property in the manner he so desires. For example, a landowner's interest in building a house in the shape of a pyramid might conflict with the local government's interest in safeguarding property values in the neighborhood.[4] Such competing interests most commonly manifest themselves in the context of zoning and land-use regulations.

Despite property ownership being theoretically fundamental, the practical protections of this right have proven to be thin. When a zoning or land-use regulation is enacted that dictates what property owners can and cannot do with their property, courts have accorded substantial deference to such zoning and regulatory decisions. As such, landowners have continued to seek to enforce the rights guaranteed by the Fifth Amendment. However, due to the wide deference courts have chosen to bestow on state and local governments, landowners continue to find certain rights associated with property all but taken.

This note will first examine the law surrounding the takings clause as it existed prior to the Supreme Court's opinion in *Murr v. Wisconsin*.[5] After summarizing the case and recounting the Court's decision, this note will analyze the Court's opinion and explain how the Court's addition to takings jurisprudence was necessary. This note will then discuss why the particular method chosen nevertheless failed due to the Court's circular application of its new-found test to the issue presented.

II. The Law Before the Case

The Fifth Amendment encompasses various rights, which most commonly include the right against self-incrimination and the right against "double jeopardy."[6] The so-called "takings" clause also finds its home in the Fifth Amendment. The Fifth Amendment, along with the other first ten amendments, originally applied only to the federal government. However, almost all of them, including the Fifth Amendment, have since been held to also apply to state governments through the operation of the Fourteenth Amendment.[7]

4. *See* State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970).
5. 137 S. Ct. 1933 (2017).
6. U.S. CONST. amend. V.
7. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 122 (1978) [hereinafter *Penn Central*].

The Takings Clause of the Fifth Amendment provides that no "private property shall be taken for public use, without just compensation."[8] The extent of this protection has stirred up much litigation and debate. When a property owner asserts a takings claim, the following issues commonly arise: 1) whether the government's purported use constitutes a "public use";[9] whether the government has paid "just" compensation;[10] 3) whether the property has in fact been "taken" within the meaning of the Constitution; and 4) issues regarding the relevant property at issue.[11] The manner in which the Court resolves these issues depends on whether the property owner alleges a categorical taking or a regulatory taking.

A. Categorical Takings

Categorical takings overtly fall within the meaning of the Fifth Amendment's takings clause. These are also referred to as *per se* takings. Such takings relevant for the purposes of this note consist of permanent physical fixtures[12] and regulations that effectively deprive an owner of "*all* economically beneficial use[]" of his or her land.[13] For example, the Court held in *Lucas* that where a regulation enacted in 1988 prevented a landowner from building permanent residential structures on two residential lots he had purchased two years before the regulation's enactment,[14] and where the trial court found that the property "had been rendered valueless as a result,"[15] a taking had occurred requiring just compensation.[16] Therefore, under a categorical takings analysis, if the governmental action amounts to a physical occupation on private property or if it effectively eliminates all economic use of the property, such action is held to be a taking for which the government must compensate the owner.[17]

8. U.S. CONST. amend. V.
9. *See* Kelo v. City of New London, 545 U.S. 469 (2005).
10. *See* Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015).
11. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (failing to reach the issue because the landowner did not raise it in the petition for certiorari); *see also Penn Central*, 438 U.S. 104 (1978).
12. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425-26 (1982).
13. Lucas v. S.C. Coastal Council, 505 U.S 1003, 1019 (1992).
14. *Id*. at 1003.
15. *Id*. at 1020.
16. *Id*. at 1019.
17. *See id*.; *Loretto*, 458 U.S. at 426.

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B. Regulatory Takings

Initially, the takings clause was thought to extend only to physical takings.[18] However, the Court later established that a taking can be effectuated in ways that do not necessarily involve physical occupancy.[19] Specifically, land use and zoning regulations, though typically viewed as permissible exercises of police power, can also run afoul of the Fifth Amendment's takings clause.[20] The Court held in *Pennsylvania Coal* that "while property may be regulated to a certain extent, if [the] regulation goes too far[,] it will be recognized as a taking,"[21] otherwise known as a regulatory taking. The challenged regulation in *Pennsylvania Coal* accomplished just that.[22]

In *Pennsylvania Coal*, a coal company conveyed surface rights to a piece of property, but it expressly retained the right to mine coal under the property.[23] The grantees further waived all claims for damages that might have arisen from the mining.[24] Decades later, the state passed an Act that prohibited mining coal in such a way that would "cause the subsidence of . . . any structure used as a human habitation."[25] The company's mining activity had such effect, and the grantees sought to enjoin the mining on the grounds that the mining violated the Act.[26] However, the Court found that the Act effectively destroyed the company's property and the contractual rights it expressly reserved.[27] Therefore, the Court held that applying the Act to the case at hand amounted to a taking.[28]

After this revelation, a taking may present itself in three ways: 1) permanent physical occupancy;[29] 2) a regulation depriving a landowner of all economically beneficial use of his or her property;[30] and 3) takings of personal property.[31]

18. *Lucas*, 505 U.S. at 1014.
19. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) [hereinafter *Pennsylvania Coal*].
20. *See id*.
21. *Id*. at 415.
22. *Id*. at 414-15.
23. *Id*. at 412.
24. *Id*.
25. *Id*.
26. *Id*. at 412-13.
27. *Id*. at 413.
28. *Id*. at 415.
29. *Loretto*, 458 U.S. at 426.
30. *Lucas*, 505 U.S. at 1019.
31. *See Horne*, 135 S. Ct. at 2425-26.

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Nevertheless, even if a regulation has not deprived the landowner of all economically beneficial use of his or her property, all is not lost for the owner. Beyond categorical takings, determining whether one's property has been taken under the meaning of the Fifth Amendment is not a simple task.[32] The Court has laid down a set of factors to consider when determining whether a regulatory action nevertheless constitutes a taking.[33]

In *Penn Central*, New York City enacted a Landmark Preservation Law which required prior approval before making alterations to property that had been designated as a landmark.[34] The Grand Central Terminal had been so designated.[35] Several months after its designation, owners of the Terminal entered into an agreement with a development company whereby the company would construct an office building above the Terminal.[36] Due to the Terminal's landmark designation, the owners and the company sought approval of two construction plans; the Commission denied both plans.[37] The owners subsequently sued, claiming a Fifth Amendment takings violation and sought, inter alia, injunctive relief.[38]

There, the Court had to determine "whether the application of New York City's Landmark Preservation Law to the parcel of land occupied by the Grand Central Terminal ha[d] 'taken' the owner's property."[39] To determine whether the preservation law effectuated a taking, the Court introduced three factors. The Court considered: 1) "the economic impact of the regulation on the claimant"; 2) "the extent to which the regulation . . . interfere[d] with investment-backed expectations"; and, 3) "the character of the governmental action."[40] As to the "character" analysis, the Court determined whether the "interference with property can be characterized as a physical invasion by the government" or simply as interference that "arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[41] These factors make up the test courts apply when presented with a regulatory takings claim. Therefore,

32. *Penn Central*, 438 U.S. at 123.
33. *Id.* at 124.
34. *Id*. at 112-13.
35. *Id*. at 115.
36. *Id*. at 116.
37. *Id*.
38. *Id*. at 119.
39. *Id*. at 107.
40. *Id*. at 124.
41. *Id*.

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if a state action does not amount to a per se taking, the case will be analyzed on a case-by-case basis under the test set forth in *Penn Central*.

Notwithstanding its developments, takings jurisprudence prior to *Murr v. Wisconsin* was not sufficient to guide the resolution of the underlying issue presented therein.[42] As Chief Justice Roberts noted in his *Murr* dissent, the two methods of inquiry for regulatory takings "presuppose[d] that the relevant 'private property' [had] already been identified."[43] Therefore, *Murr* presented an opportunity for a long-overdue resolution to what has become a dispositive preliminary issue.

III. Statement of the Case

A. The Burdensome Regulations

The land at issue in *Murr* is located along the Lower St. Croix River in Troy, Wisconsin.[44] Due to its aesthetic and tourism value, the St. Croix River had been designated for federal protection in 1972.[45] In an effort to comply with the federal designation, Wisconsin enacted several regulations regulating land use and development in the area surrounding the River.[46] Pursuant to these regulations, lots could not be treated as separate building sites unless "the lot [wa]s in separate ownership" or "the lot by itself or in combination with an adjacent lot . . . [was] under common ownership . . . [and] ha[d] at least one acre of [buildable land] area."[47] However, the regulations included an exception for presently existing substandard lots, known as a grandfather clause, which made an exception for "substandard lots" that were not under common ownership.[48] In addition to the minimum "project area" requirement, a provision which operated as a merger provision applied to adjacent lots under common ownership; it provided that such lots could neither be sold nor developed if they did not meet the size requirement for developable land.[49] Owners of substandard lots could apply for variances through the local zoning board upon proof of "unnecessary hardship."[50]

42. *See* 137 S. Ct. 1933, 1940 (2017).
43. *Id.* at 1954 (Roberts, C.J., dissenting).
44. *Id*. at 1940.
45. *Id.*
46. *Id.*
47. *Id.* (citing Wis. Admin. Code NR § 118.08).
48. *Id.* (citing Wis. Admin. Code NR § 118.08(4)(a)(1)).
49. *Id.* (citing Wis. Admin. Code NR § 118(4)(a)(2)).
50. *Id.* (citing Wis. Admin. Code NR § 118.09(4)(b)).

B. The Facts

The land at issue in *Murr* consisted of two adjacent lots, known as Lot E and Lot F, located along the St. Croix River.[51] The lots are described as follows:

> The lots have the same topography. A steep bluff cuts through the middle of each, with level land suitable for development above the bluff and next to the water below it. The line dividing Lot E from Lot F runs from the riverfront to the far end of the property, crossing the blufftop along the way. Lot E has approximately 60 feet of river frontage, and Lot F has approximately 100 feet. Though each lot is approximately 1.25 acres in size, because of the waterline and the steep bank[,] they each have less than one acre of land suitable for development. Even when combined, the lots' buildable land area is only 0.98 acres due to the steep terrain.[52]

The petitioners' parents previously owned both lots and had held the lots under separate ownership.[53] The family plumbing company held title to Lot F, and the parents held title to Lot E in their names.[54] A recreational cabin existed on Lot F,[55] and Lot E remained vacant.[56] The Murr siblings—two sisters and two brothers—later obtained title to the two lots from their parents, receiving title to Lot F in 1994 and title to Lot E in 1995.[57] Upon obtaining title to Lot E, the adjacent lots came under common ownership.[58] Due to the substandard nature of each lot, this triggered the so-called "merger" provision which effectively merged both lots and purported to treat them as a single parcel.[59]

As time passed, the siblings wanted to move the cabin on Lot F to a different portion of the lot,[60] so they decided to sell "Lot E to fund the

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51. *Id*.
52. *Id*.
53. *Id.* at 1941.
54. *Id.*
55. *Id.*
56. Petitioners' Brief on the Merits at 4, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1459199, at *4.
57. *Murr*, 137 S. Ct. at 1940.
58. *Id.* at 1940-41.
59. *Id.* at 1941.
60. *Id.*

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project."[61] They sought variances from the St. Croix County Board of Adjustment, including a variance to allow the separate sale or use of the lots, but the Board denied their requests.[62]

C. Procedural History

Frustrated with their inability to proceed with their improvement plan, the petitioners sued, claiming the regulations amounted to a regulatory taking of Lot E.[63] They argued that the regulations "depriv[ed] them of all, or practically all, of the use of Lot E because [it] cannot be [separately] sold or developed."[64] The circuit court found that no taking occurred, reasoning that, notwithstanding the regulations, the "petitioners retained 'several available options for the use and enjoyment of their property'" and the property's value was not sufficiently diminished to amount to a taking.[65] The Wisconsin Court of Appeals affirmed, finding that the property as a whole consisted of both Lots E and F together,[66] because the zoning laws were already in effect when they acquired the property, the petitioners did not have a reasonable expectation to use the lots separately,[67] and, agreeing with the circuit court, "the regulations diminished the property's combined value by less than ten percent."[68]

D. Issue Presented

This case presented the issue of whether, under the parcel as a whole rule, Lots E and F together or Lot E alone was the relevant "property" to be considered in determining whether a taking occurred.[69]

IV. Decision

A. Majority: The Whole Lot of It

To resolve the issue before it, the Court made two inquiries: 1) what is the private property at issue; and 2) has the property been "taken" so as to require just compensation?[70] The Court began its analysis by

61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* (internal quotation marks and citation omitted).
65. *Id*.
66. *Id*.
67. *Id*. at 1941-42.
68. *Id*. at 1942.
69. *Id.* at 1943-44.
70. *Id.*

acknowledging that the resolution of the question presented "may be outcome determinative."[71] Realizing that there are no specific guidelines to identify the relevant parcel, the Court reflected on prior decisions and noted two useful concepts on which it has previously relied in guiding its decisions.[72]

First, the Court noted that it does not "limit the parcel . . . to the portion of property targeted by the challenged regulation," referencing its decisions in *Penn Central* and *Tahoe-Sierra*.[73] This concept has evolved into the "parcel as a whole" rule.[74] The second concept is the Court's continued caution against "the view that property rights under the takings clause should be coextensive with those under state law."[75] Per this concept, the Court recognized the danger in allowing state law to define completely one's property rights as they exist under the takings clause—particularly in ways that would yield results detrimental to an owner's investment-backed expectations, which the takings clause has been held to protect.[76]

Noting that "no single consideration can supply the exclusive test for determining the denominator," and paring this reality with a couple of familiar concepts, the Court introduced three new factors to help determine the denominator.[77] Those factors are: 1) the treatment of the land under state and local law; 2) the physical characteristics of the land; and 3) the prospective value of the regulated land.[78] According to the Court, the ultimate goal of this inquiry is to determine "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or . . . as separate tracts."[79]

For the first factor, the Court directed that the treatment of the land under state and local law be given "substantial weight" with particular attention to "how it is bounded or divided."[80] Under the same inquiry, the Court further

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71. *Id.* at 1944.

72. *Id.*

73. *Id*. (citing Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002); *Penn Central*, 438 U.S., at 130).

74. *Id.* at 1952 (Roberts, C.J., dissenting) ("We rejected that narrow definition of 'property' at issue, concluding that the correct unit of analysis was the owner's 'rights in the parcel as a whole.'") (citing *Penn Central*, 438 U.S. at 130-31).

75. *Id*. at 1944.

76. *Id.* at 1952.

77. *Id.* at 1945.

78. *Id.*

79. *Id.*

80. *Id.*

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imputes some knowledge to a prospective landowner of the restrictions and regulations affecting his or her subsequent use of the property.[81]

Applying this factor, the Court quickly dismissed the solutions to determining the denominator proposed by both the State and the petitioners.[82] It then determined that this factor supported the property being treated as one parcel because state law merged Lots E and F, the merger provision was valid, and the petitioners voluntarily subjected themselves to the merger provision by bringing the lots under common ownership.[83]

Guiding the second factor, the Court identified the relevant characteristics of the land to include "the physical relationship of any distinguishable tracts, the parcel's topography, the surrounding human and ecological environment[, and whether] the property is located in an area . . . subject to, or likely to become subject to, environmental or other regulation."[84] Here, the Court also determined that treating the lots as a single parcel was appropriate.[85] The Court specifically pointed out that the lots' rough terrain and narrow shape and the land's location along the St. Croix River made it reasonable for Petitioners to "expect their range of potential uses to be limited" and to "anticipate[] regulations affecting the enjoyment of their property, as the [area] was . . . regulated . . . under state, federal, and local law long before Petitioners possessed the land."[86]

When applying the third, final factor, courts must "assess the value of the property under the challenged regulation, [while paying] special attention to the effect of burdened land on the value of other holdings."[87] Here, the Court determined the "prospective value Lot E [brought] to Lot F support[ed] considering the two as one parcel,"[88] and the benefits of using both lots as a whole mitigated the prohibition on selling Lot E.[89] Additionally, if the Murrs sold the lots together, the value of the combined lots would be $698,300 whereas, if sold individually, Lot F's value would be $373,000 and Lot E's value would be $40,000[90]—a difference of over $285,000. After applying each factor, the Court determined that the

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81. *Id.*
82. *Id.* at 1946-47.
83. *Id.* at 1948.
84. *Id.* at 1945-46 (citation omitted).
85. *Id.* at 1948.
86. *Id.*
87. *Id.* at 1946.
88. *Id.* at 1948.
89. *Id.*
90. *Id.* at 1949.

appropriate denominator for a regulatory takings claim was Lots E and F together as a single parcel.[91]

After establishing the denominator, the Court then analyzed whether a regulatory taking had occurred. The Court first found that the Murrs had not been deprived of all economically beneficial use of the property under *Lucas* because "[t]hey [could still] use the property for residential purposes."[92] The Court then examined the Murrs' takings claim under the *Penn Central* test. Pointing to the appraisal values, the Court determined that the economic impact of the regulation was not severe.[93] Furthermore, the fact that the regulation existed prior to their acquisition of both lots negated any claim that they reasonably expected to use the lots separately.[94] Finally, the Court determined that "the governmental action was a reasonable land-use regulation [in an] effort to preserve the river and surrounding land."[95] After applying the various tests and factors, the Court held that a compensable taking had not occurred.[96]

B. Dissent

Three justices refused to join the majority's reasoning.[97] The dissent opined that by introducing "an elaborate test" to define the property at issue, the majority departed from its longstanding tradition of looking to state law to define such property.[98] The dissent further asserted that, when determining the denominator, the majority considered criteria that "should [actually] be considered when deciding if a regulation constitutes a 'taking.'"[99] In doing so, the Fifth Amendment's protection against takings and its effectiveness as a check on the government is undermined.[100] Because the denominator is chosen based on reasonableness, state governments now have an incentive to seek aggregation of legally distinct property in the context of litigation.[101] The state will now have two bites at the constitutional apple when a court makes a takings inquiry.[102]

91. *Id.* at 1948.
92. *Id*. at 1949.
93. *Id*.
94. *Id*.
95. *Id.* at 1948-50.
96. *Id*. at 1949.
97. *Id.* at 1950 (Roberts, C.J., dissenting).
98. *Id.*
99. *Id.* at 1954.
100. *Id.*
101. *See id.* at 1954-55.
102. *See id.* at 1955.

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V. Analysis

The threshold issue presented in *Murr* by no means came as a surprise to the Court; this "denominator" issue has manifested itself to the Court in the past.[103] Until now, the Court has been able to avoid it. However, through *Murr*, the issue was resurrected and the Court finally made an attempt to resolve it. In doing so, the Court introduced something necessary but used it in a manner that was harmful to one of the few meaningful roots in which property guarantees are grounded.

A. The Necessary End

A method to aid the determination of the relevant parcel at issue was long overdue. The Court has previously cautioned against relying on state law alone to define property rights under the takings clause.[104] However, beyond this, no meaningful guidance had been offered. Therefore, the Court's decision to enumerate precise considerations to weigh alongside state law was nothing short of necessary to avoid arbitrary inquiries into defining the relevant parcel and to ultimately avoid misguided applications of takings jurisprudence when the relevant parcel is in dispute.

However, in his dissent, Chief Justice Roberts interpreted the majority's test as a deviation from the Court's long-standing tradition of defining the property according to state law.[105] Under his reasoning, he would have the Court look *only* to state law to define the property at issue.[106] However, such limitation is not a sound solution to resolving disputes regarding state laws which purport to redefine property boundaries. Furthermore, such strict and exclusive reliance would open the door to uncontrolled regulatory action which would threaten to reduce fundamental property rights to a mere theory. As the majority noted, merger provisions that would be completely unreasonable can exist.[107] The Court used the example of a regulation purporting to consolidate nonadjacent property under common ownership.[108] Thus, if the Court strictly limited itself to defining property based on state law alone, it would find itself upholding absurd regulatory provisions purporting to bind remote tracts of land. Furthermore, the dissent's confidence that any "gamesmanship" or "obvious attempts to alter

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103. *See Palazzolo*, 533 U.S. 606 (2001).
104. *See id*.
105. *Murr*, 137 S. Ct. at 1950 (Roberts, C.J., dissenting).
106. *Id.*
107. *See id.* at 1945.
108. *Id.*

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the legal landscape in anticipation of a lawsuit [would not] be difficult to . . . disarm"[109] is void of a non-arbitrary explanation of how the Court would do so. Nevertheless, though the Court heeded such a necessary call, it did so in a way that resulted in more harm than good.

B. The Evil Means

On its face, the Court's first factor seems harmless. Including the state's treatment of certain property when determining the denominator is the logical thing to do considering that property—the group of rights one has in relation to a certain thing,[110] is a matter of state law. Furthermore, even the dissent acknowledged that the Court traditionally looks to state law to define the boundaries of parcels of land,[111] which makes such consideration consistent with precedent.

However, the extent to which the Court relied on state law to identify the denominator was circular. It assumed the question for which an answer was sought and bypassed the inquiry that needed to be made, which was whether the challenged state regulation resulted in a taking of the Murrs' property.[112] Though the laws currently in place at the time the owner acquires the property may provide some insight into the reasonableness of a landowner's anticipated uses of his property, such deferential reliance on those laws assumes that they are both reasonable and presently in accord with the Fifth Amendment. Therefore, when that law is attacked for running afoul of the Fifth Amendment, it is circular, then, to allow this one-third of the overall inquiry to be so substantially determinate of the ultimate outcome.

When the regulation purporting to define the property at issue is the very regulation being challenged, other indicia of state law should be lent more weight than that which was accorded by the Court. Specifically, traditional references to state law defining parcels by the metes and bounds, the legal distinctions of the land, whether the owner paid taxes on each parcel individually or collectively, and the length of time between acquisition of the first and second parcels, just to name a few. These things are also capable of speaking to an owner's reasonable expectations regarding whether his property will be treated as separate tracts or a single parcel.

109. *Id*. at 1953 (Roberts, C.J., dissenting).
110. *Id.* at 1951 (citing United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).
111. *Id.* at 1950 (Roberts, C.J., dissenting).
112. *See id.* at 1941.

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Additionally, the manner in which the owner treats the property immediately after and during possession—whether he himself treated them as separate or as single parcels—is another insightful indicator of the owner's expectations regarding his property. Here, the Murrs' parents first purchased Lot F and later purchased Lot E, which remained undeveloped, and they held Lot E for investment purposes until they could decide what to do with it.[113] They then passed this same expectation to their children who held on to Lot E for another decade before deciding to make good on the investment and seeking to sell it for the benefit of Lot F.[114] Rather than crediting this as an expectation of using the lots separately, the Court deemed these facts as mere evidence of knowledge of the regulations and, thus, an unreasonable expectation of using the lots separately,[115] never mind how the owners objectively manifested their expectation.

Furthermore, the manner in which the Court applied the second factor was, again, harmful to landowners and helpful to states. The Court decided that physical characteristics of property can put an owner of adjacent parcels on notice that his property might be subject to regulation, and that his use or enjoyment of the land might be in some way limited.[116] Under the Court's reasoning, the fact that some regulation might apply to property in a certain area is somehow sufficient to plant in an owner's mind that, specifically, his two properties will be treated as one; thus, the anticipation of regulation in general equates an expectation of a specific type of regulation. Not only is such conclusion far-reaching, but it is also inconsistent with the regulations in place affecting the property at issue in *Murr*. The regulations expressly allowed an owner of a substandard lot in the regulated area to nevertheless develop or sell it despite the physical characteristics of the land.[117]

Furthermore, when setting out to define the relevant property, considering the prospective value of the regulated property is destined to yield unfair results for a landowner similarly situated to the Murr siblings. The Court credited the enhanced value of both lots together as evidence of the reasonableness of considering both parcels as one lot. However, relying on such a "two-is-better-than-one" result might be a reasonable decision if one's goal was economic gain, but it does not equate a reasonable

113. Petitioners' Brief on the Merits at 3, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1459199, at *3.

114. *Murr*, 137 S. Ct. at 1941.

115. *See id.* at 1948.

116. *See id.*

117. *See* Wis. Admin. Code NR §§ 118.08(4)(a)(1); 118.09(4)(b).

expectation that two adjacent lots under common ownership would be treated as one, especially if a property owner uses the two lots for separate purposes. Conversely, simply because two parcels would be worth more or retain approximately the same value if they were treated as a single parcel does not make an owner's expectation of maintaining separate uses of the lots unreasonable. To hold as such places a property owner's "destiny" regarding his property into the hands of the government, a gesture which, as the Court noted, the government would be eager to accept.[118] Furthermore, as the dissent noted, examining any impact on property's value comes into play when determining whether there has been a taking;[119] this inquiry arises only after the relevant property has been identified.[120] Inviting value in the equation twice steepens the slope of the already uphill battle that petitioners seeking to bring a takings claim must face.

C. Where Do We Draw the Line?

The precise test chosen for determining the relevant parcel blurs the line between a denominator inquiry and a takings analysis. In fact, there can be no line between the two. As Chief Justice Roberts' dissent noted, the Court effectively applied a takings analysis to define the relevant property at issue.[121] For example, the test's third factor—the prospective value of the land—not only borrows from takings jurisprudence, but it effectively determines the outcome of the first factor in takings analysis—the economic impact of the regulation—before the Court has even undergone the inquiry. If the Court determines that the prospective value of the regulated land weighs in favor of assigning the broader definition to the relevant parcel, then the logical effect of that outcome carries over to takings analysis. Otherwise, a court could find that the prospective value of the land supports a reasonable expectation for two distinct parcels being treated as one, but yet determine that the economic impact regarding the same property is so detrimental to the owner's reasonable property expectations that it amounts to a taking and requires just compensation. One cannot conceive such an unsound result.

In addition to the similar purposes for which the Court examines value and economic impact, the line is further blurred by the overall goals in conducting each analysis. Each inquiry seeks to ascertain what an owner

118. *Murr*, 137 S. Ct. at 1943.
119. *Cf. id.* at 1954 (Roberts, C.J., dissenting) (citations omitted).
120. *Id.*
121. *Id.*

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reasonably expected to get out of the property and whether applying the challenged regulation to the owner undermines his property expectation.[122] The overlap is further evidenced in the Court's brief analysis into whether a taking had occurred.[123] After applying its new-found test, the Court simply imported its findings from determining the relevant parcel. In just four sentences, the Court held that the Murrs had not suffered a taking for the same reason that the lots in question should be treated as one.[124]

VI. Conclusion

Through its decision in *Murr*, the Court employed evil means to reach a necessary end and thereby made it nearly impossible to draw the line between solving a denominator issue and resolving a takings claim. Sound guidance was necessary to answer a both simple and difficult question. However, the manner in which the Court applied its denominator test accomplished the very thing the Court purported to reject. Though the Court expressly rejected solving the denominator issue based on state law alone, its test functionally does just that. Additionally, the second and third factors were applied in such a way to ascertain whether the state's position regarding the denominator is justified, which makes these factors in addition to state law merely illusory.

The deck remains stacked against the landowner, with each aspect of his claim being viewed in the light most favorable to the government, not once, but twice. Under the Court's new test, a victory of the battle effectively guarantees a victory of the war, and the *Murr* decision rigs each battle in such a way that continues to favor states. The Court continues to demonstrate that the constitutional assurance in the Fifth Amendment that private property will not be taken without compensation is nothing more than a thin, last resort guarantee. With each new or first impression issue, courts will continue to be deferential to states when citizens' property rights are at stake, requiring states to satisfy only a reasonableness standard for invading a fundamental right. Takings jurisprudence as a whole has now become a blur and will remain as such until the Court takes back its failed attempt to put the denominator issue to rest.

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122. *See Murr*, 137 S. Ct. at 1945-46; *see also Penn Central*, 438 U.S at 124-25.
123. *Murr*, 137 S. Ct. at 1949-50.
124. *Id.*

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